Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

BRENDA DAVIS,

PETITIONER

v.

STEVEN H. DAVIS,

RESPONDENT

APPEAL TO SUPERIOR COURT

OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

BERNETER MALLORY
ATTORNEY FOR PETITIONER
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132 1/2

QUESTIONS PRESENTED

1. Whether the Fourteenth Amendment is violated when there is an assertion only that a party is in contempt and is a fugitive; and the state appellate court doesn't require proof of the facts asserted and doesn't peer into the trial record to determine if they were true before quashing an appeal that was appealed as a matter of state constitutional right?

2. Whether the trial court violated the appellant's Fourteenth Amendment rights under the U.S. Constitution by depriving her of a fair trial when the judge refused to recuse himself from the case on the basis of bias and impropriety when he:

a. assisted appellee in obtaining and issuing subpoenas for witnesses to help his case;

b. expressed his personal opinions about appellant in that she was a fanatic; suffering from a distortion of mind although

unsupported by any evidence or medical testimony;

c. allowed the Department of Human Services to observe an otherwise closed custody proceeding to non-parties, to obtain facts to institute a Dependency Proceeding against appellant that he urged although unfounded;

d. refused to consider anyone in appellant's family for placement of the child because it assumed that they might not respect its orders?

3. Whether the trial court violated appellant's right to privacy in maintaining her family relationship with her child when:

a. the court ordered her child to be evaluated for the possibility of psychological and physical abuse, to help the Department of Human Services' case before any harm presently or prospectively was shown to have occurred and was attributable to the appellant?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Pennsylvania Supreme Court were those in the caption (appellant in Pa. No. 673 E.D. Miscellaneous Docket 1993). The appellee was represented by Regina B. Guerin, Esquire, 512 Ryers Avenue, Cheltenham, Pennsylvania, 19012. The Child Advocate for Sean Davis was William Norvel, Esquire, Defenders Association, 121 North Broad Street, Philadelphia, Pennsylvania, 19107. Donella R. Shaffer, Deputy City Solicitor, 1600 Arch Street, 7th Floor, Philadelphia, Pennsylvania, 19107 was representing Department of Human Services.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	iii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	7
STATEMENT OF THE CASE	10
REASONS FOR GRANTING THE WRIT	
I. CONSISTENT WITH THE CONSTITUTION, CAN A STATE CURTAIL DUE PROCESS OF LAW RIGHTS- ONCE THE RIGHT TO APPEAL HAS BEEN GRANTED, AND THE APPELLATE COURT QUASHES THE APPEAL ON MERE UNSWORN ASSERTIONS, THAT THE COURT DIDN'T INQUIRE IN THE VERACITY AS TO WHETHER APPELLANT WAS A FUGITIVE AND IN CONTEMPT OF AN UNIDENTIFIED COURT ORDER	22
II. THE 14TH AMENDMENT'S DUE PROCESS OF LAW CLAUSE GUARANTEES AN INDIVIDUAL A FAIR TRIAL	
A. UNDER THE 14TH AMENDMENT THE TRIAL COURT DEPRIVED THE APPELLANT OF A FAIR TRIAL BY REFUSING TO RECUSE HIMSELF AND ENGAGING IN UNCONSTITUTIONAL CONDUCT	24

III. THE TRIAL COURT VIOLATED THE APPELLANT'S 9TH AMENDMENT RIGHT TO PRIVACY (IN MAINTAINING A FAMILY RELATIONSHIP WITH HER CHILD) AS APPLIED TO STATES THROUGH THE 14TH AMENDMENT 25

IV. CONCLUSION 25

APPENDIX

TABLE OF AUTHORITIES

Page

Appleyard v. Massachusetts, 203 U.S. 222, 229, 27 S.ct 122, 51 L.ed 161 . . . 24

Bell v. Beneficial Consumer Discount, 465 Pa. 225, 348 A.2d 734 (1975) 3

Cochran v. Kansas, et al., 316 U.S. 255 . 22

Commonwealth v. Novak, 384 Pa. 237, 240, 120 A.2d 543, 544 Cert. Denied, 77 S.Ct. 35, 352 U.S. 825, L.Ed.2d 48487 (1956) 3

Fatemi v. Fatemi, 371 Pa. Super. 101, 107, 537 A.2d 840, 843 (1988) 18

Hovey v. Elliott, 167 U.S. 409 (1897) 21, 23

National Union of Marine Cooks and Stewards v. Arnold, et al., 348 U.S. 36 21

Pennsylvania v. Ritchie, 107 S.Ct. 989,
480 U.S. 39, 94 L.Ed.2d 40 (1987) 7

Skinner v. Oklahoma, 316 U.S. 535, 541,
62 S.Ct. 1110, 1113, 86 L.Ed. 1655
(1942) 21

United States v. Marshall, 856 F.2d 896
(7th Cir. 1988) 21

Constitutions, Statutes, and Rules
APPENDIX

FEDERAL CONSTITUTION

U.S. Const., Amend. IX . . . . . 1(a)

U.S. Const., Amend. XIV . . . . . 1(b)

STATE CONSTITUTION

Pa. Const., Art. 5 § 9 . . . . . 2(a)

FEDERAL STATUTES

28 U.S.C.A. § 1257(a) . . . . . 3(a)

STATE STATUTES

Pa. Juvenile Act, 42 Pa.C.S.[A.]
§ 6336 . . . . . 4(a), 4(b)

210 Pa. Code § 65.22(C) . . . . . 4(c)

STATE RULES

Pa.R.A.P., Rule 341(a) . . . . . 5(a)

Pa.R.A.P., Rule 901 . . . . . 5(b), 5(c)

Pa.R.A.P., Rule 902 . . . . . 5(d)

Pa.R.C.P., Rule 1910.13 . . . . . 5(e)

Pa.R.C.P., Rule 1915.14 . . . . . 5(f)

SUPREME COURT RULES

Supreme Court of the United States,

Rule 10.1(b)(c) . . . . . 6(a)

OPINIONS BELOW

The Opinion of the trial court is recorded in the Notes of Testimony for October 23, 1992 recorded for D.R. No. 88-13904, Court of Common Pleas, Philadelphia County, Family Court Division.

The Order of Trial Court dated December 4, 1992 is recorded at D.R. No. 88-13904, for the same court.

The Opinion of the Trial Court to the Superior Court of Pennsylvania dated May 6, 1993 is recorded at D.R. No. 88-13904, 246 Philadelphia 1993 and Juvenile Court Division at J. No. 312595 01, D. No. 6738-92-04.

The Order of Superior Court of Pennsylvania Quashing the appeal is recorded at Appellate Docket No. 246 Philadelphia 1993 (C.P. Philadelphia County No. D.R. No. 88-13904), Filed: August 13,1993.

The Order of Superior Court of Pennsylvania denying appellant's Application for Reconsideration of the order quashing her appeal

is recorded at Appellate Docket No. 246 Philadelphia 1993, (C.P. Philadelphia County No., D.R. No. 88-13904), Filed: September 1, 1992.

The Order of Supreme Court of Pennsylvania denying the appellant's Petition for Allowance of Appeal is recorded at Appellate Docket No. 673 Eastern District, Allocatur Docket 1993, Petition for Allowance of Appeal from the Superior Court dated December 20, 1993.

JURISDICTION

A Petition for Allowance of Appeal was filed on September 10, 1993 in the Pennsylvania Supreme Court from an Order of Superior Court dated August 13, 1993 at No. 246 Philadelphia 1993 quashing the appellant's appeal, and from a Superior Court Order dated September 1, 1993 denying the rehearing. An Order of the Court of Common Pleas, Philadelphia County, Family Court Division at D.R. No. 88-13904, filed December 4, 1992 giving full custody to the appellee prompted the appellate process.

This court has jurisdiction to hear this case pursuant to Title 28, U.S. Code § 1257(a), (state courts; certiorari) and U.S. Supreme Court Rule 10.1(b). The appellant asserted jurisdiction of the state appellate courts on the basis of Pennsylvania Rules of Appellate Procedure, Rule 341(a) (Final Orders).[1] It was contended that the order appealed from had a "final aspect" which supported an appeal.[2] It can be noted that the appellant's appeal "as of right" to the Pennsylvania Superior Court was not quashed because it was determined that the order appealed from was not final.

The lower court, on December 4, 1992,

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[1] See Pennsylvania Rules of Appellate Procedure, Rules 901 and 902 in Appendix - Exhibit "M" (5(b) and 5(c)).

[2] See *Commonwealth v. Novak*, 384 Pa. 237, 240, 120 A.2d 543, 544 Cert. denied, 77 S.Ct. 35, 352 U.S. 825, L.Ed.2d 48487 (1956). See also, *Bell v. Beneficial Consumer Discount*, 465 Pa. 225, 348 A.2d 734 (1975).

claimed that it entered a temporary Order[3] giving both legal and physical custody to the appellee. The court asserted in its Opinion[4] that several petitions in the case were open. The fact remained that only two cases were heard: (1) the Petition for Modification of Custody/Restricting Visitation, filed by the appellant, and (2) the Petition for Dependency, filed by the Philadelphia Department of Human Services (hereinafter referred to as DHS). Testimony was taken on those cases alone. The trial court docket decision sheet[5] fully supports these assertions. The trial court, during the October 23, 1992 hearing, stated on the record the following:

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[3] See Order of Trial Court dated December 4, 1992 in Appendix - Exhibit "C" and Notes of Testimony, December 4, 1992, pages 48 and 51.

[4] See Opinion of Trial Court to Superior Court of Pennsylvania, filed May 6, 1993 in Appendix - Exhibit "B."

[5] See Court of Common Pleas, Family Court Division, Trial Court Docket Sheet in Appendix - Exhibit "K."

" . . . O.K. WELL, THEN, LET ME TELL YOU TO YOUR FACE, I DO NOT BELIEVE THAT SEAN HAS BEEN SEXUALLY ABUSED BY HIS FATHER, AND I SO FIND ON THE RECORD, AND I FIND ON THE RECORD, MADAM, THAT YOU REFUSE TO ACCEPT REALITY AND REFUSE TO ACCEPT THE FACT YOU ARE THE CAUSE OF THE STATEMENTS THAT SEAN IS MAKING."

Thus by the December 4, 1992 hearing, although claiming to have had hearings on both the Modification of Custody and the Dependency Petitions, the trial court took no further action on the Modification of Custody. Under the guise of the Dependency hearing, the court decided the Modification of Custody when it entered its order. No evidence was produced in the Dependency hearing to justify the deprivation of the appellant's rights to the child. Counsel, during the December 4, 1992

hearing, objected to the court's conclusion.[6]

Since the December 4, 1992 hearing until now present (which is the filing of the Writ of Certiorari), the trial court has not held or scheduled a hearing on the Modification of Custody. Counsel for the appellant even requested a permanent order, but the trial court refused to issue one in order to further attempt to deny the appellant her appeal rights. The appellant had motioned the trial court to recuse itself twice during the Modification of Custody hearings, because it became apparent from the court's conduct, that a fair trial could not be had. The Court refused to recuse itself and continued to act in a hostile and biased manner towards the appellant. Thus coupled with the statements of the court in deciding against the appellant on the Modification of Custody and the court's refusal to recuse itself, the Fourteenth and Ninth Amendment constitutional rights had

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[6] See Notes of Testimony, Trial Court, December 4, 1992, page 9.

been decided finally in that case. On that basis, jurisdiction of this Court would be proper. (See *Pennsylvania v. Ritchie*, 107 S.Ct. 989, 480 U.S. 39, 94 L.Ed.2d 40 (1987).)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A full recital is set forth in the Appendix, Exhibit "M" because of the length involved.

United States Constitution, Amendment IX:

> . . . shall not be construed to deny or disparage others retained by the people.

United States Constitution, Amendment XIV:

> . . . nor shall any state deprive any person of life, liberty, . . . property, without due process of law; . . . .

Pennsylvania Constitution, Article 5 § 9:

> There shall be a right of appeal in all cases to a court of record from a

court not of record . . . to an appellate court, ...

United States Code, Title 28, Judiciary and Judicial Procedure § 1257(a):

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . .

Pennsylvania Juvenile Act, 42 Pa.C.S.A. § 6336 (Conduct of hearings):

(d) . . . , the general public shall be excluded from hearings . . .

210 Pennsylvania Code § 65.22(C):

. . . [I]n reviewing . . . , the Chief Staff Attorney [can] determine that . . . the appeal is clearly defective . . .

Pennsylvania Rules of Appellate Procedure, Rule 341(a) (Final Orders):

. . . an appeal may be taken as of right from any final order . . .

Pennsylvania Rules of Appellate Procedure, Rule 901 (Scope of Chapter):

> This chapter applies to all appeals from a trial court to an appellate court. . . .

Pennsylvania Rules of Appellant Procedure, Rule 902 (Manner of taking appeal):

> An appeal permitted by law as of right from a lower court to an appellate court shall be taken . . .

Pennsylvania Rules of Civil Procedure, Rule 1910.13 (Disobedience of Order of Court. Arrest. Contempt.):

> If a person disobeys an order of court . . . , the court may issue a bench warrant for the arrest of the person and if the disobedience is wilful may, after hearing, adjudge the person to be in contempt.

Pennsylvania Rules of Civil Procedure, Rule 1915.14. (Disobedience of Order. Arrest. Contempt.):

> If a person disobeys an order of court . . . , the court may issue a bench warrant for the arrest of the person and if the disobedience is wilful may, . . . adjudge the person to be in contempt.

Supreme Court Rules, Rule 10.1(b)(c):

> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court . . . has decided a federal question in a way that conflicts with applicable decisions of this Court.

STATEMENT OF THE CASE

This action arose out of an Emergency Petition to Restrict Visitation along with a Petition to Modify Custody filed by the appellant in the trial court. The action was

filed on May 13, 1991 and the Emergency Petition was heard before Judge Kozay, who denied the Emergency Petition but ordered that a full hearing be given the Petition to Modify Custody. This case, for the first time, was listed before Judge Levin on August 20, 1991. Over the objections of the appellant, who requested that the hearing be relisted[7] the court proceeded with the case. The appellee, although represented by counsel, chose to appear pro se.

During the August 20, 1991 hearing, although the court repeatedly stated that it would "not [be] making a decision today"[8] on the case, the court had, in fact, made up it's mind. Counsel for the appellant motioned the court to recuse itself due to bias towards Mrs. Davis at

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[7] Appellant's counsel was attached in another case at the same time as the August 20, 1991 hearing. See Notes of Testimony, August 20, 1991, pages 3-22.

[8] See Notes of Testimony, August 20, 1991, pages 10-11.

the January 16, 1992 hearing.[9] Additionally, the appellant complained of the trial court's bias towards her to the appellate court.[10]

On pages 23-26 in the Notes of Testimony for August 20, 1991 the court stated:

> "THE COURT: I WOULD SUGGEST TO YOU, SIR, THAT YOU NOT PRESS THE ISSUE FOR THE SUMMER VACATION -- O.K.? -- BECAUSE ITS GOING TO BE TOO DIFFICULT TO DEAL WITH, EVEN THOUGH IT IS UNFAIR (Emphasis added) TO YOU, AND IT WILL PUT THE CHILD IN TOO MUCH OF THE MIDDLE RIGHT NOW, UNTIL WE GET A BETTER GRIP ON IT . . . I WOULD ALSO SUGGEST TO YOU SIR, THAT, MAYBE, ONE OF THE THINGS THAT WILL HELP IS IF YOU GET SOME INDEPENDENT OBSERVERS TO OBSERVE YOU AND THE CHILD TOGETHER

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[9] See Notes of Testimony January 16, 1992, pages 4 and 5.

[10] See Appellate Brief to Superior Court of Pennsylvania filed on June 30, 1993, pages 31, 35, 36, 40 and 41 in the Appendix - Exhibit "J."

. . . . SOME COMMUNITY FIGURES OR PEOPLE THAT YOU MIGHT RESPECT WHO CAN BE WITH YOU AND THE CHILD AND CAN SEE YOUR INTERACTION WITH THE CHILD.

OBVIOUSLY, I AM NOT ASKING YOU TO GO OUT AND HIRE EXPERTS TO DO THAT. I DO NOT KNOW IF YOU CAN AFFORD TO DO THAT. BUT YOU CAN USE PEOPLE -- DO YOU ATTEND ANY CHURCH?

MR. DAVIS: UM-HUM.

THE COURT: MAYBE YOU COULD HAVE THE CHILD WITH YOU WITH A RELIGIOUS FIGURE. IT DOES NOT HAVE TO BE THE LEADER OF THE CHURCH. IT CAN BE SOMEONE THAT IS RESPECTED IN THE COMMUNITY WHERE THE CHILD IS WITH YOU AND THAT PERSON AND CAN SEE THAT YOU ARE A CARING FATHER, BECAUSE SHE DOES NOT BELIEVE THAT. NOW, IF YOU HAVE PEOPLE HERE TO TELL ME THAT, THAT WILL HELP. IF YOU HAVE PEOPLE HERE TO TELL ME THAT HE IS AN EVIL MAN, I

WILL HEAR IT, O.K.? BUT THAT IS HOW I WILL APPROACH THE CASE.

MR. DAVIS: IT WILL BE BEFORE YOU, YOUR HONOR?

THE COURT: BEFORE ME. IT WILL BE BEFORE ME. I WILL DO THAT, O.K.?

MR. DAVIS: THANK YOU, YOUR HONOR.

THE COURT: NOW, IF YOU HAVE SOME UNFOUNDED REPORT BY DHS --

MR. DAVIS: UM-HUM.

THE COURT: -- AND THINGS OF THAT SORT, YOU MIGHT, TO HELP YOURSELF ON THE DAY OF THE HEARING, TRY AND GET THOSE PEOPLE THERE FOR THE HEARING; THE DHS WORKERS.

MR. DAVIS: IT'S -- I CAN'T --

THE COURT: ALL YOU HAVE TO DO IS, WHEN YOU GET YOUR NOTICE --

MR. DAVIS: UM-HUM.

THE COURT: -- CALL MY SECRETARY AND TELL HER THE NAMES OF THE PEOPLE YOU WANT THERE AND WE WILL ISSUE A

SUBPOENA FOR THEM TO APPEAR.

MR. DAVIS: WHO'S YOUR SECRETARY?

THE COURT: YOU FIND JUDGE LEVIN. YOU CALL MY SECRETARY.

MR. DAVIS: O.K.

THE COURT: TELL HER THAT I TOLD YOU TO TELL HER THAT THESE ARE THE PEOPLE THAT YOU NEED. I HAVE NO IDEA WHO THEY ARE. O.K.?

MR. DAVIS: WOULD THAT INCLUDE DOCTORS, ALSO?

THE COURT: SURE.

MR. DAVIS: O.K.

THE COURT: ANYBODY YOU WANT, IF THEY ARE PEOPLE THAT ARE REALLY GOING TO HELP ME.

MR. DAVIS: O.K.

MRS. DAVIS: THANK YOU, YOUR HONOR.

MR. DAVIS: THANK YOU, YOUR HONOR.

THE COURT: O.K. . . . "

The court in giving appellee this extensive advice versus only one reference of help to

appellant, lost its appearance of impropriety and impartiality.

It was contended on Appeal that the trial court's impartiality could reasonably be questioned by the appellant.[11] Not only did the court offer to help the appellee in obtaining subpoenas, but he did, in fact, admit on the record that his secretary, at his direction, assisted with appellee's subpoenas.[12]

During the February 14, 1992 hearing,[13] the trial court started to permit DHS employees to sit in on an otherwise closed proceeding to non-parties.

The Pennsylvania Juvenile Act[14] sets forth

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[11] See Appellate Brief to Superior Court of Pennsylvania, filed June 30, 1993, pages 30 and 31 in Appendix - Exhibit "J."

[12] See Notes of Testimony August 20, 1991, pages 25 and 26.

[13] See Notes of Testimony, February 14, 1992, pages 8, 32 and 33.

[14] The Pennsylvania Juvenile Act, 42 PA C.S.[A.] § 6336 in Appendix - Exhibit "M" (4(a) and 4(b)).

guidelines for all hearings and the general public is to be excluded. The court, even allowed workers from the Children's Crisis Treatment Center to observe the proceedings, although no pleadings for dependency had been filed.[15]

During the January 16, 1992 through April 10, 1992 hearings, the court acted as advocate for the appellee. This issue was preserved on appeal by trial counsel objecting to trial court's conduct in a motion to recuse and raising these claims in appeal to Superior Court.

The trial court was biased towards the appellant when it determined arbitrarily not to consider the appellant's family as an alternative to placing the child. The court claimed that Barbara Whittaker was the mother of the appellant and that she was acting as an

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[15] See Notes of Testimony,December 4, 1992, pages 9 and 13 and Notes of Testimony, February 14, 1992, pages 8, 32 and 33.

advocate for her daughter and would not follow his order.[16] Counsel raised an objection to this claim.[17]

On December 7, 1992, appeal as of right[18] was taken from the trial court's order awarding temporary full custody of the parties' child to the appellee, to the Superior Court. On August 13, 1993, by a per curiam order, the Superior Court quashed the petitioner's appeal.[19] The court used *Fatemi v. Fatemi*, 371 Pa. Super. 101, 107, 537 A.2d 840, 843 (1988) as its standard to quash the appellant's appeal. In appellants' Pennsylvania Supreme Court brief, she complained that Superior Court failed to follow the dictates that it found important in *Fatemi* when

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[16] See Notes of Testimony, December 4, 1992, page 48.

[17] See Notes of Testimony, December 4, 1992, pages 38-40, 47, and 48.

[18] See Pennsylvania Constitution, Article 5 § 9, in Appendix - Exhibit "M" (2(a)).

[19] See Order of Superior Court of Pennsylvania Quashing Appeal in Appendix - Exhibit "D."

it decided to quash appellant's appeal.

The appellate court claimed that it used the averments in the appellant's Motion to Stay All Proceedings/and a Request for Injunction Pending Appeal (hereinafter referred to as Motion for Stay) as a basis for quashing the appeal and denying her Application for a Rehearing on September 1, 1993.[20]

The appellant, in her Pennsylvania Supreme Court Petition for Allowance of Appeal, preserved her constitutional issues by alledging that the lower appellate court failed to consider the trial lower court record and didn't require proof of the assertions that the appellant was a fugitive and in contempt. The appellate court did not accurately state the averments contained in the petitioner's Motion for Stay because it stated that appellant's

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[20] See Motion to Stay All Proceedings/and a Request for Injunction Pending Appeal in Appendix - Exhibit "G" and Application for Reconsideration of Petition to Quash Appellant's Appeal and Request for an Expedited Hearing in Appendix - Exhibit "H."

failure to comply with the order and failure to appear for court appearances resulted in the issuance of several bench warrants for her arrest. The petitioner attached the two subject bench warrants to the Motion for Stay and it is clear from the face of the warrants that the first was issued on January 4, 1993 and the second and final one was issued on January 25, 1993, which stated that it was issued pursuant to the January 4, 1993 bench warrant.[21] The appellant in her Motion for a Rehearing stated that she had never missed a court hearing that she was informed of except the December 4, 1992 hearing, and she notified the court and her attorney of her absence. The court did not issue a bench warrant for her arrest as she was not in contempt of court.[22] As an added note, the trial court did not issue a subpoena for the

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[21] See Appendix - Exhibit "L" (Bench Warrants submitted as part of Petition for Allowance of Appeal to Pennsylvania Supreme Court).

[22] See Notes of Testimony, December 4, 1992, pages 4, 5, 7, and 8.

petitioner's appearance to any subsequent hearing after December 4, 1992, in which it would have been justified in issuing a bench warrant.[23] During the January 4, 1993 hearing, Melvin Porter stated that he had not heard from the petitioner, but didn't tell the court that he had not tried to contact her directly. He alleged that he had spoken, at some unknown time, with appellant's sister. All of appellant's sisters deny that they had ever spoken to Mr. Porter. Mr. Porter claimed that by speaking to her sister, which he conveniently did not name, served as notice that "at least, her family was aware of the notice that was sent." Although he spoke of a notice, Mr. Porter offered no proof of documents that a

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[23] See Hovey v. Elliott, 167 U.S. 409 (1897); National Union of Marine Cooks and Stewards v. Arnold, et al., 348 U.S. 36; United States v. Marshall, 856 F.2d 896 (7th Cir. 1988); Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942).

written notice of any sort ever existed.[24] The record is void of any notices sent by the court or that Mr. Porter was going to accept service of any notices for the petitioner. On appeal to Superior Court this issue was preserved in her appellate brief.

REASONS FOR GRANTING THE WRIT

I.

The decision below is squarely in conflict with this court's requirement in *Cochran v. Kansas* that the appellate court inquire into the truth of asserted allegations before dismissal of an appeal.

Certiorari should be granted when state courts resolves conflicts on legal principles in direct opposition to Supreme Court precedent. The Superior Court of Pennsylvania has quashed an appeal to punish appellant, whose appeal was a matter of state constitutional right. The appellate court accepted unsworn assertions of

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[24] See Notes of Testimony, January 4, 1993, page 4.

appellee's counsel, unsupported by personal knowledge, and the trial court record that the appellant was a fugitive and in contempt. This Court in *Hovey v. Elliott*, held long ago, in 1897, that a party has a right to be heard for the purpose of explaining his conduct, and . . . thus government could not . . . condemn the citizen without any opportunity to be heard. The appellate Court under Procedural Due Process of Law was required to give the appellant a hearing on the issues raised in the Motion to Quash the Appeal, as to whether she was a fugitive and in contempt. The appellate court should have demanded extrinsic proof other than self serving assertions by counsel that these allegations were true. The general rule that when a party is in contempt and is not allowed to oppose the relief sought by a party, was not understood in *Hovey v. Elliott* to operate as a denial of a hearing in any court where a party is there as a matter of strict right. The appellant had not appealed to Superior Court by

permission but pursuant to P.A. Constitution Article 9 Section 5, appeals as of right. In *Appleyard v. Massachusetts*, the District Attorney applied to the government of New York for a requisition upon the Governor of Massachusetts for Mr. Appleyard as a fugitive from justice. This court held that giving the accused full opportunity to be heard and to introduce evidence is a protected Constitutional Right. Once the right is granted, that protection should apply to state appellate courts.

II.

This court has held that the 14th Amendment guarantees an individual a fair trial. The Trial Court's conduct when looked at in toto violated the appellant's 14th Amendment Rights under the U.S. Constitution. The court acted as advocate for the appellee, held and voiced hostile views toward the appellant, used intimidation tactics to make the court an instrument of wrong and oppression.

III.

The Trial Court violated the appellant's 9th Amendment Right to privacy in maintaining a family relationship with her child as applied to states through the 14th Amendment.

The Trial Court was required under the 14th Amendment to require proof first of harm to the child or proof that future harm was imminent and the appellant was unable to protect the child before it took "total" custody from the mother. This case involved the power of the state to take a child first so that it could go on a "fishing exhibition" to collect evidence of physical and mental harm to permanently deprive the appellant of her parental rights. The appellant had a constitutional right to privacy to be let alone by the state when no harm had occurred to her child.

IV.

CONCLUSION

For these various reasons, the petition for certiorari should be granted. The posture of this case is the only opportunity for petitioner to seek review of the ultimate ruling of Pennsylvania's Appellate Superior Court that an appellate court doesn't always have to require proof of any facts asserted in Motions to Quash appeals before it quashes them. If the petitioner is correct in urging that the State appellate court resolved the issue erroneously, the matter should be remanded to the Superior court for disposition.

Respectfully submitted,

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_____
Date

APPENDIX

TABLE OF CONTENTS

OPINIONS, ORDERS, FINDINGS OF FACT, CONCLUSIONS OF LAW

Page

Exhibit "A"

Opinion of Trial Court, October 23, 1992 (Excerpts from Notes of Testimony) . . . . . A-1 - A-3

Exhibit "B"

Opinion of Trial Court to Superior Court of Pennsylvania, Filed May 6, 1993 . . . . . B-1 - B-5

Exhibit "C"

Order of Trial Court dated December 4, 1992 . . . . . C-1 - C-2

Exhibit "D"

Order of Superior Court of Pennsylvania Quashing Appeal, Filed August 13, 1993 . . . . . D-1 - D-2

Page

Exhibit "E"

Order of Superior Court of Pennsylvania denying Motion for Rehearing, Filed September 1, 1993 . . . . E-1 - E-2

Exhibit "F"

Order of Supreme Court of Pennsylvania denying Request for Allowance of Appeal, Filed December 20, 1993 . . . . . F-1 - F-2

Exhibit "G"

Motion to Stay All Proceedings/and a Request for Injunction Pending Appeal . . . . . G-1 - G-7

Exhibit "H"

Application for Reconsideration of Petition to Quash Appellant's Appeal and Request for an Expedited Hearing . . . . . H-1 - H-7

Page

Exhibit "I"

Amended Petition to Quash and/or Dismiss Appellant's Appeal Pursuant to Rule 341 & 1972 . . . . . I-1 - I-10

Exhibit "J"

Appellate Brief to Superior Court of Pennsylvania, filed June 30, 1993 (pp. 31, 35, 36, 40, 41) . . . . . J-1 - J-9

Exhibit "K"

Court of Common Pleas, Family Court Division, Trial Court Docket Sheet . . . . . K-1 - K-6

Exhibit "L"

Bench Warrants dated 1/4/93 and 1/25/93 . . . . . L-1 - L-4

Exhibit "M"

CONSTITUTIONS:

Federal Constitution

1. U.S.Const.Amend. IX . . . 1(a)

U.S.Const.Amend. XIV . . . 1(b)

Page

State Constitution

2. Pa.Const., Art.5 § 9 . . . 2(a)

STATUTES:

Federal Statutes

3. 28 U.S.C.A. § 1257(a) . . 3(a)

State Statutes

4. Pennsylvania Juvenile Act
42 Pa.C.S.A.
§ 6336 . . . . . 4(a), 4(b)
210 Pa.Code § 65.22(C) . . 4(c)

RULES:

State Rules

5. Pa.R.A.P., Rule 341(a) . . 5(a)
Pa.R.A.P., Rule 901 5(b), 5(c)
Pa.R.A.P., Rule 902 . . . 5(d)
Pa.R.C.P., Rule 1910.13 . 5(e)
Pa.R.C.P., Rule 1915.14 . 5(f)

Supreme Court Rules

6. Supreme Court of the
United States, Rule
10.1(b)(c) . . . . . 6(a)

EXHIBITS "A" - "L"

OPINIONS, ORDERS, FINDINGS OF FACT,

CONCLUSIONS OF LAW

A-1 TO L-2 FOLLOWS:

EXHIBIT "A"

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
FAMILY COURT DIVISION-DOMESTIC RELATIONS
BRANCH

- - -

BRENDA DAVIS :
v. : D.R. NO. 88-13904
STEVEN H. DAVIS :

- - -

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
FAMILY COURT DIVISION - JUVENILE BRANCH

- - -

IN THE MATTER OF : PETITION NO. D 06738 92 04
:
SEAN DAVIS : J. NO. 312595 01

- - -

FRIDAY, OCTOBER 23RD, 1992

- - -

COURTROOM 5
34 SOUTH 11TH STREET
PHILADELPHIA, PENNSYLVANIA

- - -

EXCERPT OF PROCEEDINGS

- - -

BEFORE: HONORABLE STEPHEN E. LEVIN, J.

PRESENT: MELVIN H. PORTER, ESQUIRE
FOR THE PLAINTIFF/RESPONDENT

REGINA B. GUERIN, ESQUIRE
FOR THE DEFENDANT/PETITIONER

WILLIAM W. NORVELL, ESQUIRE
CHILD ADVOCACY UNIT
DEFENDER ASSOCIATION OF PHILADELPHIA
FOR THE MINOR, SEAN DAVIS

DONELLA R. SHAFFER, ESQUIRE
DEPUTY CITY SOLICITOR
FOR THE DEPARTMENT OF HUMAN SERVICES

- - -

* * *

THE COURT: O.K. WELL, THEN, LET ME TELLYOU TO YOUR FACE, I DO NOT BELIEVE THAT SEAN HAS BEEN SEXUALLY ABUSED BY HIS FATHER, AND I SO FIND ON THE RECORD, AND I FIND ON THE RECORD, MADAM, THAT YOU REFUSE TO ACCEPT REALITY AND REFUSE TO ACCEPT THE FACT YOU ARE THE CAUSE OF THE STATEMENTS THAT SEAN IS MAKING.

* * *

EXHIBIT "B"

IN THE COURT OF COMMON PLEAS OF

PHILADELPHIA COUNTY

BRENDA WHITAKER DAVIS:		FAMILY COURT DIVISION
v.	:	D.R. NO. 88-13904
STEVEN H. DAVIS	:	246 Phila. 1993
IN THE MATTER OF	:	JUVENILE COURT DIV.
SEAN DAVIS	:	J. NO. 312595 01
	:	D. NO. 6738-92-04

OPINION

This appeal arises out of a hotly contested custody matter, in which there are several open petitions.[1] This Court has held numerous hearings in this case.[2]

Appellant-Mother has consistently alleged

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[1] Appellant-Mother's petitions include a custody modification filed June 18, 1990 and a contempt of custody filed February 20, 1991. Appellee-Father has an open petition for contempt of custody filed May 9, 1990, and petitions to modify filed July 31, 1990 and November 4, 1992.

[2] August 20, 1991; January 16, 1992; February 14, 1992; March 10, 1992; April 10, 1992; June 3, 1992; September 18, 1992, October 23, 1992 and December 4, 1992.

that Appellee-Father is sexually abusing the child, Sean (born November 11, 1988). Appellee-Father denies these allegations. In April, 1992, the Court was informed that the Department of Human Services was concerned that the repeated medical examinations,[3] performed at the request of Appellant-Mother, were detrimental to Sean's emotional well-being. The Court, with the agreement of the parties, appointed a child advocate for Sean on April 10, 1992.

On June 3, 1992, the Court ordered that Sean be evaluated at the Children's Crisis Treatment Center. Appellant-Mother was ordered to cooperate with the child advocate. (Dep. Rev. Order, 6/3/92). On September 18, 1992 and October 23, 1992, the Court reiterated Mother's

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[3] For example, in their petition the Department alleged that Sean had undergone examinations for sexually transmitted diseases and other related injuries on seventy-five occasions between June 1989 and June 1990. (Urgent Petition for Dependency Adjudication, 4/8/92, at ¶7(c)).

obligation to see that the child attend the program at the Children's Crisis Treatment Center.

At the hearing held December 4, 1992, the Director of Social Work at the Center testified that Sean had only attended four days in the five weeks since the previous hearing. (N.T. 12/4/92, at 14-16). The social worker assigned to Sean by his child advocate testified that she was concerned about the child's lack of attendance at the program. (Id. at 27-8). She stated that she believed it was "imperative" that Sean's psychological evaluation proceed. (Id. at 32). She recommended that custody of Sean temporarily be given to Appellee-Father, "to ensure that the evaluation at the Children's Crisis Treatment Center can be completed." (Id.). The child advocate agreed with this recommendation, as did the Department of Human Services. (Id. at 36). Accordingly, the Court ordered that legal and physical custody of the child, Sean, be temporarily transferred to

Appellee-Father, pending the next hearing before the Court.

Before addressing the merits of the Order, the Court requests that Appellant-Mother's appeal be quashed, as the Order being appealed is not a final, appealable order. The finality of an Order is determined by its effect: it is considered final if it effectively terminates the litigation or puts the litigant out of court. Parker v. McDonald, 344 Pa. Super. 552, 496 A.2d 1244 (1985). In this case, the order in question clearly stated that the change in custody was temporary and contemplated further proceedings before the court. Under the circumstances, this order cannot be considered final. Nor is this order an interlocutory order from which an appeal may lie as of right. Pa. R. App. P. 311 (1992). Therefore, this appeal should be quashed.

Alternatively, if the Superior Court determines that the appeal should not be quashed, this Court believes that the Order of

December 4, 1992 should be affirmed.

The reasons that the child advocate and the Department gave for supporting the social worker's recommendation are more than adequately explained in the notes of testimony from the hearing before this Court on December 4, 1992. The Court believes that a review of the notes from this hearing will reveal that the Court did not err in its order.

BY THE COURT:

SIGNATURE ON FILE

STEPHEN E. LEVIN,J.

DATED: 5-6-93

EXHIBIT "C"

IN THE COURT OF COMMON PLEAS OF

PHILADELPHIA COUNTY

BRENDA WHITAKER DAVIS : FAMILY COURT DIVISION

PLAINTIFF :

vs. :

STEVEN H. DAVIS :

DEFENDANT : NO. 88-13904

ORDER

AND NOW, this 4 day of Dec., 1992, it is hereby ordered that:

Temporary Legal & Physical Custody

☐ Confirmation of Custody
☐ Custody
☐ Partial Custody
☐ Visitation

of the child Sean Davis D of B - 11-11-88 is awarded to father, Steven H. Davis as follows:

It is further ordered that: Temporary Physical and Legal Custody of child Sean Davis Confirmed to the father, until next Court hearing for completion of evaluation at

Children's Crisis Center, Philadelphia Police to assist the father in obtaining immediate Physical custody.

BY THE COURT:

SIGNATURE ON FILE

EXHIBIT "D"

BRENDA DAVIS, : IN THE SUPERIOR COURT OF
Appellant : PENNSYLVANIA
:
v. :
:
STEPHEN H. DAVIS: No. 246 Philadelphia 1993
Appellee :(C.P. Philadelphia County No.
: D.R. No. 88-13904)
: Filed: August 13, 1993

ORDER

This appeal has been taken from the order awarding temporary custody of the parties' child to the appellee. The appellant's failure to comply with the order and failure to appear for court appearances resulted in the issuance of several bench warrants for her arrest. The trial court has been unable to locate the appellant or the child. Through counsel, the appellant has petitioned this court to enjoin the police from assisting the trial court in the

enforcement of its orders in this matter. Accordingly, this appeal is hereby QUASHED under 210 Pa. Code § 65.22(C). See Pa.R.A.P. 1972(6); Fatemi v. Fatemi, 371 Pa. Super. 101, 107, 537 A.2d 840, 843 (1988) (this court may properly quash an appeal where a parent has violated a custody order and the contempt is found to be flagrant). The appellant's motion for stay and injunction is hereby DENIED as moot.

Appeal QUASHED.

PER CURIAM

EXHIBIT "E"

BRENDA DAVIS,	:	IN THE SUPERIOR COURT OF
Appellant	:	PENNSYLVANIA
	:	
v.	:	
	:	
STEPHEN H. DAVIS:		No. 246 Philadelphia 1993
Appellee	:	(C.P. Philadelphia County No.
	:	D.R. No. 88-13904)
	:	Filed: September 1, 1993

ORDER

Through counsel, the appellant has averred that "[t]he lower court after the filing of the appeals issued several bench warrants for [her] arrest and took measures to invade . . . [her] privacy . . . by procuring unlisted, non-published, unavailable telephone numbers of . . . persons whom the lower court had the Philadelphia Police Department and others to call and harass in reference to the petitioner" and that "[t]he lower court continues as of [the

filing of the motion for stay] to issue bench warrants for [her] arrest . . . [and] [t]he Philadelphia Police Department and other authorities continue to go to the petitioner's address and other places seeking to arrest her." (emphasis added) Appellant's Motion to Stay All Proceedings/And a Request for Injunction Pending Appeal at paras. 3-5. Through counsel, the appellant has petitioned this court to enjoin the police from assisting the trial court in the enforcement of its orders in this matter. Id. Accordingly, The appellant's application for reconsideration of the order quashing her appeal is hereby DENIED under 210 Pa. Code § 65.22(C). See Pa.R.A.P. 1972(6); Fatemi v. Fatemi, 371 Pa. Super. 101, 107, 537 A.2d 840, 843 (1988). See also Rules of Professional Conduct, Rule 3.3(a)(1) (a lawyer shall not knowingly make a false statement of material fact or law to a tribunal). The appellant's request for an expedited hearing is hereby DENIED as moot.

PER CURIAM

EXHIBIT "F"

IN THE SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

BRENDA DAVIS,	:	No. 673 Eastern District
	:	Allocatur Docket 1993
Petitioner	:	
	:	Petition for Allowance
v.	:	of Appeal from the
	:	Superior Court
STEPHEN H. DAVIS,	:	
	:	
Respondent	:	

ORDER

PER CURIAM

AND NOW, this 20th day of December, 1993, the Petition for Allowance of Appeal from the Superior Court is hereby denied.

Mr. Justice Papadakos did not participate in the decision of this matter.

TRUE COPY FROM RECORD

Attest: December 20, 1993

SIGNATURE ON FILE

PATRICIA JOHNSON

Chief Clerk

Supreme Court of Pennsylvania

Eastern District

EXHIBIT "G"

IN THE SUPERIOR COURT OF PENNSYLVANIA

BRENDA DAVIS,	x COURT OF COMMON PLEAS
APPELLANT	x PHILADELPHIA COUNTY
	x FAMILY COURT DIVISION
VS.	x D.R. #88-13904
	X APPELLATE DOCKET #246PHL93
STEPHEN H. DAVIS,	X
APPELLEE	X

MOTION TO STAY ALL PROCEEDINGS/AND A REQUEST FOR INJUNCTION PENDING APPEAL

Comes now Brenda Davis through her attorney, Berneter Mallory avers to the following:

1. Petitioner filed appeals on December 7, 1992 from a Temporary Order of Custody, Support and of Modification of Custody based on sexual abuse.
2. The lower court failed to send the appeals up to Superior Court until January 21, 1993.

3. The lower court after the filing of the appeals issued several bench warrants for petitioner's arrest and took measures to invade the privacy of the petitioner and of her acquaintances by procuring unlisted, non-published, unavailable telephone numbers of such persons whom the lower court had the Philadelphia Police Department and others to call and harass in reference to the petitioner.

4. The lower court continues as of the filing of this Motion to issue bench warrants for the petitioner's arrest with the first commencing on January 4, 1993 and the most recent January 25, 1993. (See attached Exhibit "A1" and "A2" which is made a part of and incorporated into said document.)

5. The Philadelphia Police Department and other authorities continue to go to the petitioner's address and other places seeking to arrest her.

6. The record is void of any "final" orders because the lower court has refused to issue any to aid appeal.

7. On December 4, 1992 a Temporary Order was entered granting legal and physical custody to Stephen Davis until next court hearing for completion of evaluation of Children Crisis Center. (See attached Exhibit "B" which is made a part of and incorporated into said document.)

8. The court has failed to set a court date pursuant to that order and lacks jurisdiction over Brenda Davis to force her to physically be evaluated herself by the Children Crisis Center.

9. The court without proper notice to the petitioner held a hearing on Modification of Support and took all support away from petitioner.

10. The lower court has held petitioner in contempt by issuing arrest warrants but have not followed the five-step, two hearing procedure as enunciated by this court in civil contempt matters which includes, (1) a rule to show cause, (2) answer and hearing, (3) rule absolute, (4) hearing on contempt citations, (5) and an adjudication of contempt.

11. The lower court has held nine hearings pertaining to the appellate matters and still refuses to enter a "final" order, although in the October 23, 1992 hearing the Judge told the petitioner "The court: O.K. well, then, let me tell you to your face, I do not believe that Sean has

been sexually abused by his father, and I so find on the record, and I find on the record, madam, that you refuse to accept reality and refuse to accept the fact you are the cause of the statements that Sean is making." In spite of the previous statement and the taken away of all support without cause in the custody order, the court presumes that the appeal is interlocutory.

12. The orders issued by the court are "final" in that they preclude the petitioner from presenting any merits of her claims to the court because the court has already decided who it believes and from it's conduct has so ruled.

13. Petitioner will suffer irreparable harm if the lower court is permitted to continue it's actions against the petitioner.

14. Counsel avers that as of January 27, 1993 she presented the lower court with a MOTION FOR AN EXPEDITED HEARING TO STAY ALL PROCEEDINGS/AND A REQUEST FOR INJUNCTION PENDING APPEAL.

15. It has been over two weeks, where several attempts were made to get the lower court to rule on said Motion, either granting or denying it. The lower court has failed and refused to communicate with counsel regarding said Motion. (See Exhibit "C" which is made a part of and incorporated into said document.)

16. It is the petitioners belief that the lower court in action is in furtherance of its attempts to deny her access to appellate relief.

WHEREFORE the petitioner prays that the court grants a stay against all proceedings in the lower court and issues an injunction to the

Philadelphia Police Department in assisting the court in carrying out it's orders in this matter.

Respectfully submitted,

SIGNATURE ON FILE

Attorney Berneter Mallory
for Brenda Davis
1320 E. Johnson Street, A-106
Philadelphia, OA 19138
(215) 224-2347
I.D. NO. #49019

EXHIBIT "H"

BERNETER MALLORY, ESQ.
Attorney I.D. 49019
1320 E. Johnson Street
Building A-106
Philadelphia, PA 19138
(215) 224-2347

IN THE SUPERIOR COURT OF PENNSYLVANIA

EASTERN DISTRICT

BRENDA DAVIS, Appellant:	Court of Common Pleas
	: Philadelphia County
vs.	: Family Court Division
	: No. 88-13904
STEPHEN H. DAVIS,	:
Appellee	: Appellate Docket#
	: 246PHL93
	:
	:

APPLICATION FOR RECONSIDERATION OF PETITION TO QUASH APPELLANT'S APPEAL AND REQUEST FOR AN EXPEDITED HEARING.

The petitioner, Brenda Davis, by and through her attorney Berneter Mallory, Esquire, herein represents the following:

1. The appellant/petitioner is Brenda Davis, the mother of the minor child, Sean Davis.

2. The appellee/respondent is Steven H. Davis, the father of the minor child, Sean Davis.

3. The Superior Court entered an order, dated August 13, 1993, quashing the appellant's appeal based upon 210 Pa. Code Section 65.22(c). See Pa.R.A.P. 1972(6); Fatemi v. Fatemi, 372 Pa. Super. 101, 197, 537 A.2d 840, 843 (1988). (See attached order as Exhibit "A".)

4. The court stated that the appellant had failed to appear for court appearances which resulted in the issuances of several bench warrants for her arrest.

5. The appellant has not missed several court appearances that resulted in the

issuances of several bench warrants.

6. To the contrary the appellant missed only the December 4, 1992 hearing because of a medical condition. The court was made aware of the fact by the appellant through her attorney and a call was made to the court personnel as discussed in the notes of testimony during the December 4, 1992 hearing pages 4 through 8. (See December 4, 1992 Notes of Testimony as Exhibit "B")

7. The court, although it did not determine that the appellant was sick, it did however accept it for the moment, for argument's sake and requested proof of the fact at the next hearing. (See December 4, 1992 Notes of Testimony, pages 8,9 as Exhibit "C".) NO BENCH WARRANT WAS ISSUED FROM THIS HEARING.

8. Unknown to the appellant a January 4, 1993 hearing was held wherein the court inquired as to the appellant's whereabouts from, Mr. Porter, her attorney.

9. The appellant was not mailed a notice of this hearing, neither did counsel for appellant inform her of the hearing. Unlike Fatemi the appellant at no time requested counsel to be given notice instead of her.

10. The counsel for the appellant, Mr. Porter, did not tell the appellant about the hearing on January 4, 1993, and when asked by the court whether he told her personally about the hearing stated, "Unfortunately, I have not heard from my client. I have talked to her sister, which means that, at least, her family was aware of the notice that was sent...." (See January 4, 1993 Notes of Testimony, page 4 as Exhibit "D".)

11. The appellant only has two sisters residing with her at 1610 Manton Street. Assuming the attorney called her residence he did not speak to any of these sisters.

12. Mr. Porter did not have the personal phone numbers of the appellant's other sisters

who resided at other residences, because they have unlisted numbers.

13. The court did issue a bench warrant for her none attendance at the January 4, 1993 hearing. Several attempts were made to serve copies of the same warrant. The purpose for the bench warrant was to assure the appearance of the appellant, yet the court withdrew it's bench warrant and no hearings have been scheduled.

14. Although counsel for the appellant petitioned the court to enjoin the police from assisting the trial court in the enforcement of the court's orders, it was a proper request for relief.

15. Counsel for the appellee, Regina Guerin, knew or should have known at the time that she filed the Amended Petition to Quash and or Dismiss Appellant's Appeal pursuant to Rule 341 and 1972 that (1) there were no outstanding warrants against the appellant, (2) the court was not looking for the appellant and (3) neither was she ever a "fugitive".

16. Since the January 4, 1993 hearing the court has not scheduled or held a hearing where the appellant was notified personally or through her new counsel.

17. Fatemi v. Fatemi does not apply in the instant case because (1) no contempt hearing was held as permitted by law, (2) the appellant was not found in contempt for not obeying a court order, (3) the child has not been placed in danger and (4) the appellant has at all times kept her residence at 1610 Manton Street, Philadelphia, Pennsylvania. Therefore, she cannot be called a "fugitive" when she is not on the run and there are no outstanding warrants for her arrest. (See Affidavit of Residency as Exhibit "E".)

18. Counsel for appellant had her assistant to inquire of the Philadelphia Domestic Relations' Warrant Department as recent as August 18, 1993 and no warrant for her arrest is even shown on the computer according to "Cheryl" that works in the

department. Since February 1993 there have been no attempts by police to serve a warrant for the appellant's arrest.

19. The appellant has executed an affidavit stating that no warrants for her arrest are outstanding and that she has at all times cooperated with the court in this matter. (See Exhibit "E".)

20. The appellant's conduct cannot be categorized as flagrant as enunciated in Fatemi and should not be a basis for quashing her appeal.

WHEREFORE the appellant prays that this honorable court grant her relief by setting aside the order dated August 13, 1993 and reinstate her appeal. Appellant requests for an expedited hearing on this petition.

Respectfully submitted,

SIGNATURE ON FILE

Berneter Mallory, Esquire

EXHIBIT "I"

REGINA B. GUERIN, ESQ.
Attorney I.D. #30239 ATTORNEY FOR
512 Ryers Avenue
Cheltenham, Pa. 19012
(215) 887-9420

IN THE SUPERIOR COURT OF PENNSYLVANIA

EASTERN DISTRICT

BRENDA DAVIS,	:	Court of Common Pleas
Appellant	:	Philadelphia County
	:	Family Court Division
v.	:	No. 88-13904
	:	
STEPHEN H. DAVIS,	:	Superior Court No.
Appellee	:	246PHL93

AMENDED PETITION TO QUASH AND/OR DISMISS APPELLANT'S APPEAL PURSUANT TO RULE 341 & 1972

The petitioner, STEPHEN H. DAVIS, by and through his attorney, REGINA B. GUERIN, ESQ., hereby represents the following:

1. The appellee/petitioner is STEPHEN H. DAVIS, the father of the minor child, SEAN DAVIS.

2. The appellant/respondent is BRENDA DAVIS, the mother of the minor child, SEAN DAVIS.

3. The appellant/respondent is appealing the Order of December 4, 1992 by Judge Levin to the Superior Court 00246PHL93. The appellant/respondent is incorrect in that there is only one order on December 4, 1992 entered by Judge Levin and that it a Temporary Order for Custody. (See Attached Order)

4. The appellant/respondent has failed to conform to the requirements of the Pa. Rules of Appellate Procedure as provided in Rule 341.

5. The appellant/respondent has failed to conform with Rule 341 in that the Order from which she is taking her appeal is not a final order but a temporary order. Rule 341

states that "...an appeal may be taken as of right from any final order...".

6. On or about June 30, 1993, the appellant/respondent filed her Brief. In the Statement of Jurisdiction, appellant/respondent misstates the Rule 341 by stated when an order has a"final Aspect" which would have supported an appeal under prior practice, an appeal will lie under this rule.

7. On or about March 12, 1992, Rule 341 was amended and basically eliminated the appellant/respondent basis for jurisdiction by overturning prior case law.

8. In the comments to Rule 341, it clearly states:

> "The 1992 amendment generally eliminates appeals as of right under Rule 341 from orders not ending the litigation as to all claims and as to all parties. Formerly, there was case law that order not ending the litigation as to all claims and all

parties are final orders in such order have the practical consequence of putting a litigant out of court."

9. The appellant/respondent has failed to comply with Rule 1972 of the Appellate Rule of Procedure.

10. Since the entry of the Temporary Order by Judge Stephen Levin, the appellant/respondent has been a "fugitive" from the law. No one has been able to locate the appellant/respondent and the minor child who is the subject of the temporary order. Obviously, appellant/respondent is not only in Contempt of Judge Levin's Temporary Order but is a "fugitive" from the law.

10. The appellant/respondent admits in her State of the Case that on January 4, 1993, warrants for appellant/respondent's arrest were issued.

11. Rule 1972 provides that the Court may "(6) To continue generally or to quash

because the appellant is a fugitive."

12. The appellee/petitioner believes that this Honorable Court has the basis to Quash the Appeal under Rule 341 and Rule 1972.

WHEREFORE, the appellee/petitioner respectfully requests this Honorable Court to Quash and/or Dismiss the Appellant's Appeal pursuant to the Rules of Appellate procedure.

SIGNATURE ON FILE

Regina B. Guerin, Esq.

Attorney for Petitioner

STATEMENT OF JURISDICTION

This is an appeal from the Court of Common Pleas, Philadelphia County, Pennsylvania, Family Court Division to the Superior Court of Pennsylvania. The court has jurisdiction of this case pursuant to Pennsylvania Rules of Appellate Procedure Rule 341 (a) (Final Orders). (a) General Rule except as prescribed in subdivision (b) and (c) of this rule, an appeal may be taken as of right from any final order of an administrative agency or lower court. Where an order has a "final aspect" which would have supported an appeal under prior practice, an appeal will lie under this rule. Commonwealth v. Novak, 384 PA. 237, 240, 120 A.2d 543, 544 Cert. denied, 77 S.Ct. 35, 352 U.S. 825, 1L.Ed.2d 48 (1956). See also Bell v. Beneficial Consumer Discount A., 465 PA. 225, 348 A.2d 734 (1975).

Although the lower court on December 4, 1992 entered a temporary order of legal and physical custody to the appellee, under the guise of the dependency hearing the court had in fact decided the Modification of Custody as noted in the December 4, 1992 hearing Notes of Testimony pages 45, 46 and excerpts from the October 23, 1992 hearing Notes of Testimony, Page 2. The court on January 4, 1993 held a hearing it claimed to "persuade her that what we were going to do was not harmful to the child". (Notes of Testimony, January 4, 1993, page 5) The court since that time has issued arrest warrants for the appellant and conducted wiretaps of her resident phone. The appellant has been "put out of court" by the lower court's actions and appeal is her only remedy.

STATEMENT OF THE CASE

This action arose out of an Emergency Petition to Restrict Visitation along with a Petition to Modify Custody. The action was filed with the court on May 13, 1991 and was heard before Judge Kozay who denied the Emergency Petition but ordered that a full hearing be given to the Petition to Modify Custody and the case was listed before Judge Levin on August 20, 1991. The case was re-listed after a hearing for a semi-protracted case for additional testimony to be taken January 16, 1992. The case was re-listed for additional testimony on February 14, 1992. On March 10, 1992, the case was heard again for additional testimony and re-listed for April 10, 1992. On April 10, 1992, the parties agreed to an appointment of a child advocate through the Defender's Association and Judge Levin ordered all dependent petitions regarding allegations of abuse and neglect

etc. are to be consolidated before him, and he retained jurisdiction over the custody aspects of the case. The case was continued once again for a hearing on additional testimony for Wednesday, June 3, 1992. On June 3, 1992 the custody and dependency case was re-listed after some testimony for a hearing data of September 18, 1992. On September 1992, before a hearing officer a Petition to Modify Support was heard and on October 27, 1992 Exceptions to the Petition to Modify Support was filed. On November 4, 1992 a Motion to Modify Custody was filed by the defendant, Steven Davis. On December 4, 1992 a hearing was held whereby testimony on the Dependency hearing, the Plaintiff's Petition to Modify Custody, the Defendant's Petition to Modify Custody and a ruling on the Plaintiff's Petition to Modify Support was discussed and the court's ruling on the matters. Notice of an appeal was filed by the Plaintiff to the Superior Court on December 7, 1992. On January 4, 1993 a

hearing was held, the appellant was not present, the reason for the hearing is unknown. Since January 4, 1993 warrants for appellant's arrest have been issued. On January 27, 1993 the Appellant filed a Petition for an Expedited Hearing to Stay All Proceedings and a Request for Injunction Pending Appeal. On February 22, 1993, the Appellee filed a Motion to Quash the Appeal with the Superior Court.

EXHIBIT "J"

IN THE SUPERIOR COURT OF PENNSYLVANIA

PHILADELPHIA COUNTY

BRENDA DAVIS, : D.R. NO. 88-13904

APPELLANT

VS : APPELLATE DOCKET NO.

000246PHL93

STEVEN H. DAVIS, :

APPELLEE

BRIEF FOR APPELLANT

THIS IS AN APPEAL FROM AN ORDER FROM THE COURT OF COMMON PLEAS PHILADELPHIA COUNTY DATED DECEMBER 4, 1992 GRANTING CUSTODY TO STEVEN H. DAVIS.

BERNETER MALLORY, ESQ.

1320 E. JOHNSON STREET

BLDG. A-106

PHILA. PA 19138

ATTORNEY FOR APPELLANT

motions were based upon were the alleged bias towards the appellant and the lack of his impartiality.

During the August 1991 hearing, although the court repeatedly stated that it would not make up its mind about the case, the court had in fact made up its mind that the father wasn't "a pervert, an evil man, who is terribly sick, and should be in prison. The other is that your apprehension is growing out of an anger, an unconscious anger at the father for what he did to you". (See Notes of Testimony, August 20, 1991, Pages 6 & 7) During that hearing and many of the subsequent hearings the court verbalized its favor and partiality towards the appellee, Mr. Davis. Some examples of the courts are as follows:

MR. DAVIS: I know your position, but what can I do? Should I stop my visits with my son, although I

would not like to? What do you think that I should do, under the circumstances? ....I don't want to walk away.

THE COURT: No, no because you doing it in the best interest." (See Notes of Testimony, August 20, 1991)

The court in making this statement showed that it had already formed an opinion as to who it believed and thus proceeded to make sure Mr. Davis would receive assistance with his case. On page 23 of the August 20, 1991 hearing the court stated:

the appellant's lawyer could give him a call, he well knew that it was improper for a lawyer to have ex parte communications with a judge and vice versa, and could not reasonably think that the lawyer would take him up on his single offer. Not only did the court offer to help Mr. Davis with the subpoenas, he did in fact admit that his secretary at his discretion assisted with appellee's subpoenas. (See Notes of Testimony, February 1992, not yet available)

After the January 16, 1992 hearing, the court started to permit DHS employees to sit in on an otherwise closed proceeding to non-parties under the guise of just observing. This action was intimidating to the appellant because she had had numerous unpleasant encounters with DHS and was threatened by this. In fact, the court was well aware of the friction between DHS and appellant. (See Notes of Testimony, January 16, 1992, Pages 65 & 138) The court continued this

practice over the objection of counsel in the December 4, 1992 hearing. (See Notes of Testimony, December 4, 1992, Pages 11-13) The Juvenile Act[23], sets forth guidelines for all hearing and the general public to be excluded. The court over the objection of counsel allowed a DHS social worker to observe the proceedings from the Children's Crisis Treatment Center. (See Notes of Testimony, December 4, 1992, Page 13) During the January 16, 1992 thru April 10, 1992 hearings the court, although it was sitting as the trier of fact and of law, through

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[23] The Juvenile Act, 42 PA. C.S. Section 6336.

its actions acted as counsel for the defendant and constantly made personal statements to show he was doing things for Mr. Davis' benefit. Judge Levin committed error when he gave advice to appellee and was argumentative with the appellant. (See Notes of Testimony, January 16, 1992, Pages 42-55) Additionally, the trial court committed error by intimidating both appellant's counsel and appellant when it asked appellant's counsel without provocation from any of the parties at the hearing "are you a Jehovah's Witness?" When counsel objected and stated at least three or four times that the question was not relevant to anything, the court demanded an answer. The court did not choose one of the hundreds of other religious affiliations to ask counsel if she belonged to, but made inquiry into what she was in fact affiliated with. (See Notes of Testimony, February 14, 1992, not yet available)

unconscious anger at the father." The court further stated that "the appellant sincerely believes she is not lying to this court she sincerely believes that this father is sexually molesting the child. I believe that is a product of a distortion in her own mind. (See Notes of Testimony, December 4, 1992) Although none of the parties put on any evidence that either the appellant was a liar or suffering from a "distortion" in the head; the appellant had numerous character witnesses to testify that she was honest and truthful (See Notes of Testimony, April 10, 1992, not yet available).

It is contended that even if the court choose to find in the custody hearing that not one of the witnesses were credible on this issue, it was not itself an expert to determine this issue especially in light of its personal feelings that the appellant was a

fanatic, not willing to accept reality as he saw it.

Another example of the lower court's bias towards the appellant was its determination not to consider the apppellant's family as an alternative to placing the child until he completed its evaluation because of statements allegedly made by Barbara Whittaker to Judge Sylvester. The court claimed that Barbara Whittaker was the Mother of the appellant and she was acting as an advocate for her daughter. (See Notes of Testimony, December 4, 1992, Page 48). Although the court was wrong in stating that the appellant's mother was named Barbara Whittaker when her name was

Ethel Whittaker; the harm done to the appellant was the courts bias towards the appellant's family to be considered as a placement for the child. The court justified its position by stating that the mother was acting as an advocate for her daughter. Because of the foregoing and more, although the record is not yet available, it is nonetheless replete with examples of bias, prejudices and intimidation. The length of the hearings from January 4, 1992 thru April 10, 1992 sometimes exceeded over 4 hours, up to five. It is the appellant's contention that this was done to intimidate her.

Appellant requests the Superior Court to vacate the order of December 4, 1992 entered by the court.

Respectfully submitted,

SIGNATURE ON FILE

Berneter Mallory, Esq.

EXHIBIT "K"

DAVIS

COURT DECISION SHEET

4-30-90 DEFENDANT'S AGREEMENT CANUSO, J.

FOR ORDER OF SUPPORT

NOW, to wit, this 24th day of APRI[L] 1990 I the above defendant, hereby agree that the Court may enter an order directing that I pay the sum of $219 per bi/weekly for the Support of WIFE: BRENDA AND CHILD SEAN effective 2-28-90. I further agree TO ADD A $200/BI-WEEKLY ARREARAGE REPAYMENT PROVISION TO "A" (DPA) ACCOUNT, AND TO ADD A $10/BI-WEEKLY ARREARAGE REPAYMENT PROVISION TO THE "B" (PLAINTIFF'S ACCOUNT. ALL OTHER PROVISION OF TH[E] EXISTING ORDER ARE TO STAND.

McGill/cmr

8/20/90 CONTEMPT PARTIAL F.M.JACKSON,J.

CUSTODY

K-1

DEFENDANT TO HAVE A WEEK'S VACATION 6 P.M. SEPT. 4, 1990 TO SEPT.11,1990. AMD 6 P.M. SEPT.21, 1990 TO SEPT.29, 1990. ALL OTHER PROVISIONS OF ORDER OF FEB. 27, 1990 TO BE COMPLIED WITH. PARTIES TO REPORT FOR MHA APPOINTMENT TODAY. HOME INVESTIGATION ORDERED. RELIST UPON COMPLETION FOR 1/2 DAY.

9/4/90 LEVIN, J. GRANTED AGREED DEFENDANT TO PAY $151.00 PER 2 WEEKS TOWARD THE CUPPORT OF SEAN BORN 11/11/88 AND WIFE EFFECTIVE JUNE 11, 1990. ALLOCATED: $135.00 FOR CHILD AND $16.00 FOR WIFE EVER TWO WEEKS. ALL PAYMENTS ARE TO BE MADE THROUGH THE BUREAU OF ACCOUNTS. HEALTH COVERAGE BE PROVIDED BY THE DEFENDANT FOR WIFE AND CHILD. AMEND WAGE ATTACHMENT. DPA ARREARS WILL BE PAID AT $2.00/TWO WEEKS AS PREVIOUSLY ORDERED.

ko

11/13/90 PETITION FOR LEAVE N. KOZAY,J.
TO WITHDRAW APPEARANCE

ATTORNEY'S PETITION TO WITHDRAW APPEARANCE FOR PLAINTIFF IS WITHDRAWN WITHOUT PREJUDICE, AS BEING MOOT.

COURT DECISION SHEET

CASE NAME: DAVIS D.R. NO. 88-13904

5/13/91 RULE RETURNABLE, CUSTODY KOZAY, J.

RULE RETURNABLE, THE 23rd day of May,1991,at 1:30pm in room "10" at 34 So.11th St.,Phila.,Pa

5/23/91 ORDER KOZAY J.

EMERGENCY PETITION TO RESTRICT VISITATION IS DENIED CASE TO BE LISTED ON A FULL HEARING ON THE MERITS OF PETITION TO MODIFY.

8/20/91 MODIFY S.LEVIN,J.
VISITATION.

PRESENT VISITAATION ORDER TO STAND. MOTHER TO COMPLY WITH ORDER. RELIST AS A SEMI-PROTRACTED CASE IN THE AFTERNOON (1:00 P.M.) BEFORE JUDGE STEPHEN LEVIN. NOTE: LETTER DATED 8/13/91, FROM ELAINE SMITH, ESQUIRE WITHDRAWING HER APPEARANCE AS OF COUNSEL FOR STEVEN H. DAVIS.

1/16/92 ORDER LEVIN, J.

MATTER NOT COMPLETED. ADDITIONAL TESTIMONY TO BE TAKEN. MATTERS TO BE RELISTED BY JUDGE S. LEVIN

2/14/92 ORDER LEVIN, J.

MATTER NOT COMPLETED. ADDITIONAL TESTIM[ONY] TO BE TAKEN. MATTER TO BE RELISTED BY JUDGE S. LEVIN

3/10/92 ORDER LEVIN, J.

MATTER NOT COMPLETED. A DDITINAL TESTMONEY TO BE TAKEN.

4/10/92 ORDER LEVIN, J.

The existing order to continue and to be obeyed. And now, this 10th day of April 1992, having heard extensive testimony from the parties this Court hereby orders that any and all dependent petitions regarding allegations of abuse or neglect, etc., ar to be consolidated before the Honorable Stephen E. Levin, who retains jurisdiction over the custody aspects of this case.

4/10/92 ORDER LEVIN, J.

By agreement of counsel, child advocate to be appointed through Defender's Association. Matter continued on the petition to Wednesday, June 3, 1993 at 1:00 p.m.

6/3/92 ORDER LEVIN, J.

RELIST THE CUSTODY AND DEPENDENC[Y] CASE ON 9/18/92 AT 1:00 p.m.

9/18/92 ORDER LEVIN, J.

CONTINUE TO 12/4/92 at 2:00 p.m.

EXHIBIT "L"

COURT OF COMMON PLEAS

FAMILY COURT DIVISION

DOMESTIC RELATIONS BRANCH

34 SOUTH 11TH STREET

PHILADELPHIA, PA 19107

EDWARD J. BLAKE
PRESIDENT JUDGE

ESTHER R. SYLVESTER
ADMINISTRATIVE JUDGE

MATTHEW M. TIERNEY
COURT ADMINISTRATOR

JOSEPH J. DIPRIMIO, ESQ.
CHIEF, DOMESTIC
RELATIONS BRANCH

Brenda Davis
1610 Manton St.
Phila Pa 19146

DATE 1-4-93
RE: B/W 1-4-93
DR#: 88-13904

TO: Brenda Davis

THIS IS TO INFORM YOU THAT A BENCH WARRANT HAS BEEN ISSUED FOR YOUR ARREST.

You can avoid being arrested if you surrendered at the following location within TWENTY-FOUR (24) hours. Monday through Friday at 9:00 A.M.

to 1:00 P.M. If you surrender after 1:00 P.M. you will held over in the DETENTION CENTER until the next working day.

34 S. 11th Street

BASEMENT LEVEL, AREA B-8A

SEE RECEPTIONIST

PHILA., PA 19107

PHONE 686-2977 OR 2978

YOUR FAILURE TO APPEAR WITHIN 24 HOURS

WILL RESULT IN YOUR ARREST

Sincerely,

WARRANT # 23

DOMESTIC RELATIONS BRANCH

WARRANT ENFORCEMENT UNIT

WARRANT OFFICER CIATTO

WILLIAM J. MCMONAGLE,

DIRECTOR, FIELD OPERATIONS

PLEASE BRING THIS NOTICE WITH YOU

WHEN YOU REPORT!!!

COURT OF COMMON PLEAS

FAMILY COURT DIVISION

DOMESTIC RELATIONS BRANCH

34 SOUTH 11TH STREET

PHILADELPHIA, PA 19107

EDWARD J. BLAKE
PRESIDENT JUDGE

ESTHER R. SYLVESTER
ADMINISTRATIVE JUDGE

MATTHEW M. TIERNEY
COURT ADMINISTRATOR

JOSEPH J. DIPRIMIO, ESQ.
CHIEF, DOMESTIC
RELATIONS BRANCH

Brenda Davis
1610 Manton St.
Phila Pa 19146

DATE 1-25-93
RE: B/W 1-4-93
DR#: 88-13904

TO: Brenda Davis

THIS IS TO INFORM YOU THAT A BENCH WARRANT HAS BEEN ISSUED FOR YOUR ARREST.

You can avoid being arrested if you surrendered at the following location within TWENTY-FOUR (24) hours. Monday through Friday at 9:00 A.M.

to 1:00 P.M. If you surrender after 1:00 P.M. you will held over in the DETENTION CENTER until the next working day.

34 S. 11th Street

BASEMENT LEVEL, AREA B-8A

SEE RECEPTIONIST

PHILA., PA 19107

PHONE 686-2977 OR 2978

YOUR FAILURE TO APPEAR WITHIN 24 HOURS

WILL RESULT IN YOUR ARREST

Sincerely,

WARRANT # 67

DOMESTIC RELATIONS BRANCH

WARRANT ENFORCEMENT UNIT

WARRANT OFFICER LOVE

WILLIAM J. MCMONAGLE,

DIRECTOR, FIELD OPERATIONS

PLEASE BRING THIS NOTICE WITH YOU

WHEN YOU REPORT!!!

EXHIBIT "M"

CONSTITUTIONS, STATUTES AND RULES

PARTS 1(a) TO 6(a) FOLLOWS:

EXHIBIT "M"

UNITED STATES CONSTITUTION, AMENDMENT IX

Amendment 9

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

UNITED STATES CONSTITUTION, AMENDMENT XIV

Amendment 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PENNSYLVANIA CONSTITUTION, ARTICLE 5, § 9

Right of appeal

There shall be a right of appeal in all cases to a court of record from a court not of record; and there shall also be a right of appeal from a court of record or from an administrative agency to a court of record or to an appellate court, the selection of such court to be as provided by law; and there shall be such other rights of appeal as may be provided by law.

UNITED STATES CODE ANNOTATED, TITLE 28, JUDICIARY AND JUDICIAL PROCEDURE § 1257

State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

PENNSYLVANIA JUVENILE ACT, 42 Pa.C.S.A. § 6336

Conduct of hearings

(a) General rule.--Hearings under this chapter shall be conducted by the court without a jury, in an informal but orderly manner, and separate from other proceedings not included in section 6303 (relating to scope of chapter).

(b) Functions of district attorney.--The district attorney, upon request of the court, shall present the evidence in support of the petition and otherwise conduct the proceedings on behalf of the Commonwealth.

(c) Record.--If requested by the party or ordered by the court the proceedings shall be recorded by appropriate means. If not so recorded, full minutes of the proceedings shall be kept by the court.

(d) Proceeding in camera.--Except in hearings to declare a person in contempt of court, the general public shall be excluded from hearings under this chapter. Only the parties, their

counsel, witnesses, and other persons accompanying a party for his assistance, and any other person as the court finds have a proper interest in the proceeding or in the work of the court may be admitted by the court. The court may temporarily exclude the child from the hearing except while allegations of his delinquency are being heard.

Motions Review Subject to Full Court Disposition.

C. If, in reviewing motions which are generally referred to the whole Court, the Chief Staff Attorney determines that the motion is patently defective or the appeal is clearly defective or can be disposed of based on established case law, the motion may be presented to the assigned motions judge. In addition, if the Chief Staff Attorney determines that further delay in presenting and disposing of a motion may result in irreparable harm, then the Chief Staff Attorney may direct the motion to a single judge for immediate consideration.

PENNSYLVANIA RULES OF APPELLATE PROCEDURE,

RULE 341(a)

Final Orders Generally.

A. General Rule. Except as prescribed in subdivisions (b) and (c) of this rule, and appeal may be taken as of right from any final of an administrative agency or lower court.

PENNSYLVANIA RULES OF APPELLATE PROCEDURE,

RULE 901

SCOPE OF CHAPTER

This chapter applies to all appeals from a trial court to an appellate court except:

(1) An appeal by allowance taken under 42 Pa.C.S. § 724 (allowance of appeals from Superior and Commonwealth Courts). See Rule 1112 (appeals by allowance).

(2) An appeal by permission taken under 42 Pa.C.S. § 702(b) (interlocutory appeals by permission). See Rule 1311 (interlocutory appeals by permission).

(3) An appeal which may be taken by petition for review pursuant to Rule 1762(a)(2) (release prior to sentence).

(4) Automatic review of sentences pursuant to 42 Pa.C.S. § 9711(h) (review of death sentence). See Rule 1941 (review of death sentences).

(5) An appeal which may be taken by petition for review pursuant to Rule 3331 (review of special prosecutions or investigations).

PENNSYLVANIA RULES OF APPELLATE PROCEDURE

RULE 902

MANNER OF TAKING APPEAL

An appeal permitted by law as of right from a lower court to an appellate court shall be taken by filing a notice of appeal with the clerk of the lower court within the time allowed by Rule 903 (time for appeal). Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but it is subject to such action as the appellate court deems appropriate, which may include, but is not limited to, remand of the matter to the lower court so that the omitted procedural step may be taken.

PENNSYLVANIA RULES OF CIVIL PROCEDURE

RULE 1910.13

Disobedience of Order of Court. Arrest. Contempt.

If a person disobeys an order of court other than a support order, the court may issue a bench warrant for the arrest of the person and if the disobedience is wilful may, after hearing, adjudge the person to be in contempt.

PENNSYLVANIA RULES OF CIVIL PROCEDURE

RULE 1915.14

Disobedience of Order. Arrest. Contempt.

If a person disobeys an order of court other than a custody, partial custody or visitation order, the court may issue a bench warrant for the arrest of the person and if the disobedience is wilful may, after hearing, adjudge the person to be in contempt.

SUPREME COURT RULES, RULE 10.1(b)(c)

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.